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August 14, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas, Secretary
Federal Communications Commission
Portals II
445 12th Street, SW
Suite TW-A325
Washington, D.C. 20554

Re: Proceeding No. RM-9913, ***FCC Accountability and Responsibility for Environmental Transgressions, and Petition for Rulemaking Regarding the NEPA, NHPA, and Part 1, Subpart I of the Commission's Rules***

Dear Ms. Salas,

Enclosed for filing in the above referenced docket are an original and four (4) copies of the *Comments of Public Employees for Environmental Responsibility (PEER)*, submitted in response and pursuant to the Commission's Public Notice issued in File No. RM-9913. *See* Report No. 2426, Consumer Information Bureau, Reference Information Center, *Petition for Rulemaking - Filed* (RM No. 9913)(July 14, 2000).

Should you have any questions, please contact the undersigned at (202) 265.7337.

Very respectfully,

Daniel P. Meyer, Esq.
General Counsel and Attorney

Enclosure

No. of Copies rec'd 0+4
List ABCDE

Before the Federal Communications Commission

WASHINGTON, D.C. 20554

In Re the Telecommunications Industry's Environmental Civil Violations in U.S. Territorial Waters (South Florida and the Virgin Islands and along the Coastal Wetlands of Maine):	)	Dkt. No. RM-9913
FCC Accountability and Responsibility for Environmental Transgressions, and Petition for for Rulemaking Regarding the NEPA, NHPA, and Part 1, Subpart I of the Commission's Rules	)	

To the Secretary, Federal Communications Commission:

COMMENTS OF PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY (PEER)

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August 14, 2000

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SUMMARY

For most "major Federal actions" committed by the Federal Communications Commission ("FCC"), fidelity to the National Environmental Policy Act of 1969 (NEPA) is predicated on the integrity of environmental reviews conducted by other agencies. As the record now shows that fidelity to NEPA is not the federal norm, the FCC must issue a Notice of Proposed Rulemaking (NPRM) asking the following questions:

- Whether the current structure of delegated authority promulgated in Part 1 of the Commission's rules adequately assigns responsibility for NEPA environmental review of the FCC's "major Federal actions" as those actions lay the ground work for fixed-wire and wireless buildout, including the laying of fiber optic cables across near and far shore coral reefs?

- Whether the use of self-certification by fixed-wire and wireless industry applicants is compromised by the weak definition of "major Federal action" within the Commission's rules, and whether, as a result of this weakness, a new definition of "major Federal action" needs to be established within the Commission's rules.

- Whether Section 1.1312 must be amended to require that the Commission conduct a review

for environmental impact even for those fixed-wire and wireless "major Federal actions" which are *not taken* to service a licensee, or *not taken* in response to an application for some Commission action.

- Whether all fixed-wire and wireless actions that *do not* require some form of preconstruction authorization are being treated equally under the law. If not, the environmental rules must be rewritten to ensure that all actions that do not require preconstruction authorization, but which involve some level of Commission action or forbearance, are reviewed for their impact on the environment.

- As the environment can be adversely affected *by the expansion of existing infrastructure* as much as it can be adversely affected by new buildout, whether categorical exemptions should be retained for "major modifications of existing or authorized facilities or equipment" as that phrase is defined in 47 C.F.R. § 1.1306 (1999).

- Whether one may craft a general rule which defines, with precision, when a *Kitchen* act such as "building" construction is so integrated with a "major Federal action" that it is effectively part and parcel of that action?

- And finally, whether the "constructive" "major Federal action" implied by Section 47 C.F.R. §63.01 of the Commission's rules is, in fact, an accurate representation of Congressional intent?

By answering these initial queries, and other questions proposed by the fixed-wire and wireless industries and all other parties during subsequent stages of this Public Notice's review, the Commission will be able to bring itself into compliance with the National Environmental Policy Act of 1969.

COMMENTS OF
PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY
(PEER)

The Federal Communications Commission has found:

> "Where local land use authorities have authorized the use of a site for communications facilities, we think that the Commission's role under NEPA should be narrowly construed. In such circumstances, we will proceed with caution and with due respect for the role and qualifications of local authorities. Deference will be accorded to their rulings and their views, particularly . . . *when the record demonstrates that environmental issues have been given full and fair consideration.*"
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> Implementation of the National Environmental Policy Act of 1966, *Report and Order* (Dkt. No. 19555), 49 FCC 2d. 1313 ¶ 39 (1974)[Emphasis supplied.]

The Federal Communications Commission ("FCC" or "Commission") began an inadvertent — though extremely effective — campaign to emasculate the National Environmental Policy Act of 1969 ("NEPA") within five years of Congressional action on that legislation. In the statement cited *supra*, the Commission established a hierarchy of environmental review. Bureaus defer to local regulators (in that category, one could also place the U.S. Army Corps of Engineers) in order to protect the FCC's technology-oriented decision-making processes from having to make environmental determinations.

But as the passage above reveals, the Commission understood that the system of decision-making underlying its environmental rules was contingent upon the record demonstrating "that environmental issues have been given full and fair consideration."[1] Attached to the *Petition for Rulemaking* presently under public notice, Public Employees for Environmental Responsibility ("PEER") included proof—in the record—of AT&T Corporation committing environmental violations

[1] *Id.*

under the colour of Commission authority.[2] Across both the coastal wetlands of Main (under Section 214 authority) and across the near shore coral reefs of the U.S. Virgin Islands (under a Submarine Cable Landing license), AT&T's actions place the Commission in violation of NEPA.

The filing of the PEER Petition was required due to the U.S. Army Corps of Engineer's ("Corps") substandard performance in administrating Nationwide Permit 12 ("Public Utilities")(also known as NWP12). Applicant corporations typically rely on NWP 12 when conducting the self-certification required prior to applying for the FCC to commit "a major Federal action." In the case of coral reefs within the jurisdiction of the United States, the applicant for a submarine cable landing license may think that the Environmental Impact Statement ("EIS") conducted by the Corps every five (5) years is sufficient environment review to meet the Commission's compliance criteria for NEPA. However, the five year cycle between EIS's and the Corps continued violations of the Sikes Act have created a decision-making environment in which it can not be stated that environmental issues have been given full and fair consideration.[3] Five years is too long a period between assessments, especially when environmental damage may occur on over much shorter time spans. And by contracting out essential government functions — such as the execution of a politically sensitive EIS — the Corps has politicized and deemphasis the EIS process to the point where *the*

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[2] In Re the Telecommunications Industry's Environmental Civil Violations in U.S. Territorial Waters (South Florida and the Virgin Islands and along the Coastal Wetlands of Maine): FCC Accountability and Responsibility for Environmental Transgressions, and Petition for Rulemaking Regarding the NEPA, NHPA, and Part 1, Subpart I of the Commission's Rules, *Petition for Rulemaking* (Dkt. No. RM-9913) (May 17, 2000) at 3 (hereinafter "PEER Petition").

[3] *See* Letter, Dr. Ken Lindeman, Environmental Defense to Colonel Joe R. Miller, District Engineer (Jacksonville District) USACE (June 27, 2000)[Attached as Exhibit A]; Dr. Eric L. Gilman, *Nationwide Permit Program: Unknown Adverse Impacts on the Commonwealth of the Northern Mariana Islands' Wetlands*, 26 COASTAL MANAGEMENT 253-277 (1998) [Attached as Exhibit B].

record demonstrates that environmental issues have NOT been given full and fair consideration.

Underlying this regulatory regime lies a major fallacy, one that propels the Commission into a crisis regarding the management of its environmental compliance. By accepting the self-certification of the regulated industry, the FCC places its fidelity to the law in the hands of the corporation. The corporation, in turn, places its fidelity in the law in the hands of some federal agency requiring the initial environmental review.[4] The wetland and sediment studies cited *supra* confirm the substance of the environmental violations submitted with the PEER Petition as proof of FCC failure.[5]

I. The Federal Communications Commission is not in compliance with Federal environmental law.

Context. Existing Commission precedent on this issue predates the Telecommunications Act of 1996. Even more significantly, such precedent precedes the mass marketing of long distance

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[4] In the Matter of AT&T Communications Proposed Construction of Fiber Optic Signal Regeneration Facility near Burkittsville, Maryland, *Comments of Level 3 Communications, LLC* (NSD-L-99-103)(Jan. 28, 2000) at 1.

[5] This crisis was also brought to pass by the FCC's delegation, to the applicant corporation, of the most essential governmental decision: *what qualifies as a "major Federal action" by the FCC?* Throughout the AT&T/Burkittsville and the Qwest/Narrangansett Tribe proceedings, rhetorical discussions worthy of medieval theologians passed between Washington law firms trying to distinguish their clients actions from the term "major Federal action." The Commission itself has determined that even a negative action—such as the issuing of blanket authority for Section 214 line construction—may constitute a "major Federal action" under NEPA or a "undertaking" under the NHPA. Amendment of the Environmental Rules; Amendment of Part 63 of the Commission's Rules Relating to Common Carriers, *Second Report and Order*, 6 FCC Rcd 1716 (1991).

services and internet communications which occurred after 1993.[6] Prior to the current buildout of fiber optic cable and wireless communications tower networks, the telecommunications industry's capital investment was — with respect to the environment — relatively less intrusive. FCC precedent is rooted in an older, now-dated era, an era when the environmental laws were simpler to enforce. A federal agency regulating that pre-expansionist industry could take an indifferent approach toward environmental law and still be in compliance with the law.

The FCC's failure to comply with federal environment law reached a peak in 1999, as individuals and groups across the Nation investigated why facilities where being built in their communities without first being reviewed under NEPA.[7] The Old Line Deutsch farmers of Maryland's Blue Ridge valleys successfully challenged AT&T in January, 2000. *See Comments Sought on AT&T Communications Construction of Fiber Optic Signal Regeneration Facility Near Burkittsville, MD - Re: Compliance with Section 214 and Environmental and Historical Preservation Requirements Under NEPA and NHPA* (NSD-L-99-103)(Dec. 30, 1999) (hereinafter "AT&T/Burkittsville proceeding"). In a parallel action, the Narragansett Nation opposed Qwest Communications over the violation of tribal lands in the Narrangansett Bay watershed.[8]

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[6] *See* Amendment of Environmental Rules, Amendment of Part 63 of the Commission's Rules Relating to Common Carriers, *Second Report and Order*, 6 FCC Rcd. 1716 (1991).

[7] In the Matter of AT&T Communications Proposed Construction of Fiber Optic Signal Regeneration Facility near Burkittsville, Maryland, *Comments of Level 3 Communications*, LLC (NSD-L-99-103)(Jan. 28, 2000) at 3.

[8] Qwest Communications Line Construction in Richmond, RI, Compliance with the Authorization Requirements Under Section 214 and the Environmental and Historical Preservation Requirements Under NEPA and NHPA, *Public Notice* (NSD File No: NSD-L-00-05) (Jan. 11, 2000).

Both these proceedings are part of the informal record explaining the circumstances under which the PEER Petition was filed. They will be cited accordingly. The effectiveness of environmental review over the exercise of Section 214 was questioned in each proceeding. However, the integrity of the Commission's environmental rules is an issue *which transcends any specific technology or any specific Bureau's delegated authority.* All unresolved environmental violations by the Commission are linked by a common technical paradigm, the buildout of fiber optic cabling infrastructure *and its wireless appendages* to meet the burgeoning needs of international trade and the Internet revolution.[9]

The Qwest/Narragansett Nation proceeding is still pending before the Common Carrier Bureau. The AT&T/Burkittsville matter was resolved when the AT&T client driving the Burkittsville project conducted a cost/benefit analysis and realized that relocation was preferable to a deeping fight with Maryland's Old Line Deutsch farmers in the lee of South Mountain. The AT&T facility is now being constructed at an under-utilized industrial park on the western edge of an aluminum smelter sited along the same Washington-to-St. Louis fiber optic line.[10]

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[9] *See* Qwest Communications Line Construction in Richmond, RI, Compliance with the Authorization Requirements Under Section 214 and the Environmental and Historical Preservation Requirements Under NEPA and NHPA, *Public Notice* (NSD File No: NSD-L-00-05) (Jan. 11, 2000).

[10] *See* AT&T Withdraws Site Plan for Construction of Fiber Optic Signal Regeneration Facility Near Burkittsville, MD - Re: Compliance with Section 214 and Environmental and Historic Preservation Requirements Under NEPA and NHPA - *File Closed* (NSD-L-99-103)(Feb. 11, 2000). *See also* In the Matter of Qwest Communications Line Construction in Richmond, RI, Compliance with the Authorization Requirements Under Section 214 and the Environmental and Historic Preservation Requirements Under NEPA and NHPA, *Comments of Level 3 Communications, LLC* (NSD-L-00-05)(Feb. 11, 2000) at 4, n.5.

Following on the momentum of the AT&T/Burkittsville and Qwest/Narragansett Nation proceedings, PEER filed the present *Petition for Rulemaking* to raise questions first broached in the two Section 214 proceedings *but which have implications for general Commission compliance with NEPA and NHPA*. The PEER Petition provided direct evidence of environmental violations by AT&T Corporation while acting under Commission authority through Section 214 review and the issuance of Submarine Cable Landing Licenses. In all three of these proceedings—AT&T/Burkittsville, Qwest/Narragansett Nation, and the present PEER Petition—the decision as to which Bureau was to respond to an environmentally-based Petition was decided by the technology, and not by the Commission's rules. This confirms the PEER Petition's allegations regarding Commission compliance with the NEPA and NHPA. There is no "Office of Environmental Compliance" at the FCC. Environmental matters are addressed in a subordinate role, one relegated to the "odd issues" pile of any particular Bureau Chief's desk.[11]

Accordingly, the first question the Commission should ask in a Notice of Proposed Rulemaking (NPRM) issued to answer the PEER Petition is whether the current structure of delegated authority promulgated in Part 1 of the Commission's rules adequately assigns responsibility for environmental review of the FCC's "major Federal actions."

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[11] The FCC has stated that environmental compliance is ensured by the Office of General Counsel. *See* DA, *Comm Daily Notebook: Petition filed requesting environmental impact reports on submarine cable applications*, COMMUNICATIONS DAILY 6 (May 22, 2000). It should be noted, however, that no delegation of authority for such environmental enforcement appears to be delineated in the Commission's rules. *See* 47 C.F.R. § 0.41 (1999).

II. All FCC "major Federal actions" must comply substantively, not theoretically, with the NEPA.

Environmental Protections Required By Federal Law. The National Environmental Policy Act of 1966 (NEPA) is binding on all Federal agencies. Section 102(2)(c) of NEPA requires the preparation of a "detailed statement" analyzing the potential environmental impacts of all "major Federal actions significantly affecting the quality of the human environment.[12] The executive agency charged with formulating and recommending national policies to promote the improvement of the quality of the environment is the Council on Environmental Quality ("CEQ").[13] The CEQ, in turn, promulgates NEPA rules which are binding on the Federal Communications Commission ("FCC" or "Commission").[14]

The NEPA requirement to prepare a "detailed statement" is statisfied by the completion of an environmental impact statement ("EIS") meeting the dictates of CEQ regulations. EIS's are decision-making tools which allow federal executives to make informed decisions about the potential environmental impacts of "major Federal actions".[15]

A "major Federal action" is defined as "actions with the effects that may be major and which are potentially subject to federal control and responsibility. The term "actions" is further defined to including "new *and continuing* activities, including projects and programs entirely *or partly*

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[12] 42 U.S.C. § 4332(2)(c).

[13] 42 U.S.C. § 4342.

[14] *See* 40 C.F.R. Parts 1500-1508 (1999).

[15] *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

financed, *assisted*, conducted, *regulated* or approved by federal agencies."[16] While some may argue that the list of "major Federal actions" is rather small, such analysis is not rooted in the CEQ's rules and regulations. The language italicized reveals that the scope of the term "major Federal action" is broader than is commonly thought by K Street lobbyists.[17]

It is incorrect to state, as Level 3 Communications, LLC, did during the AT&T/Burkittsville proceeding, that "NEPA and NHPA were passed so that actions over which the federal government had some control would not be taken prior to an analysis of whether the environment . . . might be adversely affected."[18] The correct statement is that these laws require that *the Federal agency take no action without analyzing the potentially adverse impact of that action* upon the environment. They are a positive mandate on the Federal agency, and not a source of federal regulation over actions which fall within the jurisdiction of the particular agency.[19]

The National Environmental Policy Act of 1966 is triggered by the exercise by a "major

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[16] 40 C.F.R. § 1508.18 (Emphasis supplied).

[17] Industry commentors tend to cite a trio of cases when declaring that the breadth of the term "major Federal action" is rather limited. But the issue in play at each of the agencies in question was not an issue central to those agencies' missions. When applied against actions that are part and parcel of a comprehensive system of federal regulation, these cases seem to be off point. They deal with ancillary missions in each agency. *Cf. Atlanta Coalition on Transp. Crisis v. Atlantic Regional Comm'n*, 599 F.2d 1333, 1344 (5th Cir. 1979); *Goos v. ICC*, 911 F.2d 1283, 1293 (8th Cir. 1990); *Save Our Wetlands, Inc. v. Sands*, 711 F.2d 634, 644 n.9 (5th Cir. 1983).

[18] In the Matter of AT&T Communications Proposed Construction of Fiber Optic Signal Regeneration Facility near Burkittsville, Maryland, *Comments of Level 3 Communications, LLC* (NSD-L-99-103)(Jan. 28, 2000) at 5-6.

[19] *Compare* 42 U.S.C. § 4332 *with* 40 C.F.R. §§ 1501.1, 1502.1 (1999) *with* 16 U.S.C. § 470(f) *with* 36 C.F.R. § 800.1(a). *See also Sierra Club v. Hodel*, 848 F.2d 1068, 1089 (10th Cir. 1998).

Federal action."[20] The federal agency charged with ensuring NEPA's lawful enforcement—the Council of Environmental Quality (CEQ)—has defined "major Federal action" as "actions with effects that *may* be major and which are *potentially* subject to Federal control and responsibility".[21] Note, that the language is indeterminate. The definition clearly asks federal agencies to adopt regulations of a broader scope, ones that would include not only those that *are* major, but also those that *may* be major; likewise, such regulations would also include actions which are *not only* subject to Federal control, but also those that *are* potentially subject to Federal control. The indeterminancy continues in the CEQ definition, which adds non-federal activities which are "entirely *or* partly financed, assisted, conducted, regulated *or* approved by federal agencies."[22] The regulatory scope of "major Federal action" is potentially quite large. If it seeks to serve the public interest by safe guarding the environment, a Federal agency may therefore do so.

One of the primary reasons to grant the PEER Petition and conduct a rulemaking to bring the Commission's environmental rules into the post-Telecommunications Act of 1996 era should be to end the widespread confusion which exists within the industry over when the FCC's actions constitute a "major Federal action." Take, for instance, the comments of American Telephone &

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[20] 42 U.S.C. § 4332(2)(c).

[21] 40 C.F.R. § 1508.18 (1999) (Emphasis supplied).

[22] *Id.*(Emphasis supplied). The NHPA's Section 106 provides that, "The head of any Federal department or independent agency having authority *to license* any undertaking shall . . . prior to the issue of any license . . . take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 407(f)(emphasis supplied). Note that when defining "undertaking", the Advisory Council uses an expansive definition of "license", to include "permit, license or approval." 36 C.F.R. § 800.16(y) (1999).

Telegraph during the AT&T/Burkittsville proceeding.[23] First, American Telephone & Telegraph baldly and mistakenly asserted that NEPA applied only to federal actions. Title 40, Code of Federal Regulations explicitly defines those instances *when a non-federal action* is governed by NEPA.[24] Second, counsel for American Telephone & Telegraph then assumed that jurisdiction—not the presence of a "major Federal action"—was the gravamen for determining when to apply NEPA. This is a loaded statement. Why would the use of the word "licensee" in the NEPA be governed by the definition of "licensee" under the Communications Act of 1934? Did, indeed, legislators in 1969 have the FCC's specific concerns in mind while passing environmental legislation. Not likely. The only reason one would parallel the use of these words from very different pieces of legislation is if one was straining to make jurisdiction to gravamen of NEPA's applicability.

American Telephone & Telegraph's detailed treated of the word "license" and the manner in which it is used in Section 1.1312 of the Commission's Rules is similarly strained. When AT&T underscores the allegedly narrow breadth of those Commission actions which are subject to NEPA review, it states that the universe of FCC licensing activity defines all the Commission actions triggering the application of NEPA.[25] Unfortunately for AT&T, Section 1.1312(a) of the Commission's rules state that assessment of environmental impact must be completed by "licensee or applicant".[26] The term "or applicant" is not a synonym for "licensee". Why would the drafter of

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[23] *See* In the Matter of AT&T Communications Proposed Construction of Fiber Optic Signal Regeneration Facility near Burkittsville, Maryland, *Comments of on Behalf of American Telephone & Telegraph Communications* (NSD-L-99-103)(Jan. 28, 2000) at 6.

[24] 40 C.F.R. § 1508.18 (1999).

[25] *See* In the Matter of AT&T Communications Proposed Construction of Fiber Optic Signal Regeneration Facility near Burkittsville, Maryland, *Comments of on Behalf of American Telephone & Telegraph Communications* (NSD-L-99-103)(Jan. 28, 2000) at 7.

[26] 47 C.F.R. 1.1312(a)(1999).

a rule use two words to describe what "licensee" defines precisely under the Communications Act of 1934? Two words are used to describe two groups of Commission actions: (1) all those actions which are defined by the word "licensee" and (2) all those actions which are taken in response to any party's application to the Commission for action. As NEPA concerns itself with the actions of *all* federal agencies, Section 1.1312 must be amended and its definitions revised to require that the Commission conduct a review for environmental impact even for those major Federal actions which are not taken to service a licensee or in response to an application for some Commission action.

American Telephone & Telegraph tries to jiggle the rule reading in another direction by citing to the preamble of the final rule promulgating Section 1.1312.[27] This is a dead-end argument. First, the preamble is not part of the rule and is therefore not binding on the Commission or the public. Second, to the extent the preamble provides some form of "regulatory history", the mere use of the term "radio communications facilities" is not a delimiting term. In this rule, the text is merely used to point out the special procedural requirements for radio communication facilities that do not require preconstruction authorization. It says nothing in the affirmative about all other *fixed-wire and wireless applicants for Commission action.* Indeed, as the Commission contemplates whether or not to issue a Notice of Proposed Rulemaking in response to PEER's Petition, another question to ask is whether all fixed-wire and wireless actions that do not require preconstruction authorization are being treated equally under the law. If not, the environmental rules must be rewritten to ensure that all "major Federal actions" are review for their impact on the environment.

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[27] *See* In the Matter of AT&T Communications Proposed Construction of Fiber Optic Signal Regeneration Facility near Burkittsville, Maryland, *Comments of on Behalf of American Telephone & Telegraph Communications* (NSD-L-99-103)(Jan. 28, 2000) at 8.

For the purposes of applying the NEPA to the FCC's "major Federal actions", the more appropriate approach is to define "licensee" in the context of environmental law.[28] Generally and philosophically, a "licensee" is permission to do that which is inherently illegal. It is illegal to engage in the act of driving an automobile. A State driver's license is a positive act making it legal to drive an automobile in the specific case of one particular citizen. Other activities, such as riding a bike, are not inherently illegal. In most cases, no positive government action is required to engage in this activity.[29]

Likewise, it is illegal to engage in the practice of law. One is given permission to do so through a special exemption issued by a State government (a court), usually after taking and passing a bar examination. It is not, however, inherently illegal, to engage in the act of lobbying a legislator. One may do this without a license. But lobbying is still heavily regulated. So clearly, there is a

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[28] By similar analysis, why would legislators crafting the National Historical Preservation Act of 1966 use the word "license" in a provision applicable to the heads of *all* federal agencies if that word was defined *only as it is used* in the Communications Act of 1934? Surely, this language is general in nature, and not specific to communications practice. *Compare* 16 U.S.C. § 460(f) *with* In the Matter of AT&T Communications Proposed Construction of Fiber Optic Signal Regeneration Facility near Burkittsville, Maryland, *Comments of on Behalf of American Telephone & Telegraph Communications* (NSD-L-99-103)(Jan. 28, 2000) at 10-11 (AT&T assumes, wrongly, that "license" is to be read narrowly within the confines of the Communications Act of 1934. Their Comments also neglect to underscore the fact that this provision of the NHPA includes a broad grant of jurisdiction, to include "direct or indirect jurisdiction") . As for AT&T's string cite at this point in their AT&T/Burkittsville comments, all the matters under review in these cases are assimilar to Commission actions: the erection of a Foreign chancery, PURPA small power producer systems, and block grants to small communities. In two of them, comity is being extended by one regulator to another regulator or government (and AT&T has yet to achieve the status of sovereign power). The PURPA example features a sideshow to the general regime of federal electrical power regulation. These cites are not germane.

[29] *See* BLACK'S LAW DICTIONARY 834 (3rd ed. 1954) *citing* Independent School District v. Pfost, 4 P.2d 893, 897; Monsour v. City of Shreveport, 194 So. 569 571; Western Electric v. Pacant Reproducer Corp, C.C.A.N.Y., 42 F.2d 116, 118.

difference between some activities which require "licensing" and others which are merely subject to regulation by the State. This is the winnowing process the FCC must conduct through the rulemaking requested by the PEER Petition. What *governmental* activities of the FCC are so fundamental to the creation of networked economies that the network itself would not exist but for the FCC's "major Federal action"? Alternatively, what governmental activities are so ministerial to be defined as mere regulation absent a "major Federal action"?

The nature of the activity in question leads to some rather difficult decision-making. Courts have general held that an agency may not invoke NEPA until a permit is applied for by the regulated entity.[30] But *NRDC* was a case where the activity in question, issuing of a discharge permit, was incidental to the general activity: the construction of a factory. What about those instances where the Federal action is so important to the regulatory activity that *it defines the activity itself*? A communications tower, for instance, has no role other than to serve as a platform for a transponder which cannot operate without use of public property (electromagnetic spectrum) allocated by a major Federal action (the auctioning of a license). The qualitative difference between these two activities requires a set of FCC environmental rules which can distinguish between them both.

This is why the (tele)communications industry's repeated reference to the *Kitchen* case throughout the AT&T/Burkittsville and Qwest/Narragansett Tribe proceedings lends very little to this debate.[31] The activity in question in *Kitchen* was the construction of a building, not the issuing

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[30] *NRDC v. EPA*, 822 F.2d 104, 128 (D.C. Cir. 1987)(issuing of a discharge permit under the Clean Water Act is a major Federal action, but EPA could not commence NEPA review of a party's construction of a discharge facility until the private owner applies for a discharge permit).

[31] *Kitchen v. FCC*, 464 F.2d 801 (D.C. Cir. 1972).

of a certificate under Section 214(a) of the Communications Act of 1934. And the reliance on the D.C. Circuit's analysis is all the more problematic given the Court's mistaken use of the word "primary jurisdiction" in the context of a NEPA case. NEPA distinguishes between competing agencies by distinguishing between agencies with "primary" and "secondary" responsibility to determine when an Environmental Impact Statement ("EIS"). In *Kitchen*, the D.C. Circuit muddled the use of the word by confusing it with "major Federal action".[32] Section 470(f) of the National Historical Preservation Act refers to jurisdiction in terms so broad — "direct or indirect" — that the definition is swallowed by the term "undertaking".[33]

We know *Kitchen*-thinking well, as it is the preferred reasoning of the wireless industry in its efforts to exempt its communications tower buildout from the lawful exercise of federal environmental law. Reviewing Global Crossing's comments in the AT&T/Burkittsville proceeding, one is struck by their inability to distinguish between projects which are first and foremost *real property-oriented*, and those which involve the alteration of an existing line to increase its capacity and reliability.[34] In the AT&T/Burkittsville proceeding, AT&T's presentation to the Frederick County Board of County Commissioners differed over the course of several testimonies. By the time the issue was before the Town of Burkittsville in its Section 10 Review, land trust advocates had succeeded in drawing out enough technical information to convince the Town of Burkittsville Planning & Zoning Commission (BP&ZC) that the project was to increase *both capacity and*

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[32] *See* 464 F.2d at 802.

[33] *See* 16 U.S.C. § 470(f).

[34] *See* In the Matter of AT&T Communications Construction of Fiber Optic Signal Regeneration Facility near Burkittsville, Maryland, *Comments of Global Crossing Telecommunications, Inc.* (NSD-L-99-103)(Jan. 27, 2000) at 3.

reliable over a specified area. Real property construction was tangential to the communications infrastructure buildout.

As such, the AT&T/Burkittsville project was dissimilar from the facility in *Kitchen.* If the Commission proceeds with a rulemaking in answer to the PEER Petition, one logical question to ask is how may one craft a general rule which defines, with precision, when an act such as building construction is so integrate with a major Federal action that it is effectively part and parcel of that action? In the case of the AT&T/Burkittsville proceeding, the dichotomy was functional: the fact of the line extension called for NEPA review; the fact of building construction called for Frederick County planning and zoning decision-making. These are two separate lines of inquiry, and a decision *that one forum has no role does not automatically preclude the role of another forum.* Incorporate this distinction into the Commission's environmental rules. Having done so, one removes *Kitchen* as a concern.

Returning to the concept of "major Federal action", one finds another level of argument in the industry comments for the AT&T/Burkittsville and the Qwest/Narragansett Nation proceedings. This is the direction of argument over the nature of Commission action when it comes to *the decision not to regulate.* Global Crossing touches on this issue in its AT&T/Burkittsville comments.[35] "Forbearance" is another are of inquiry which should be laid out in a Notice of Proposed Rulemaking (NPRM) to answer the PEER Petition. This subject needs to be approached with some degree of

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[35] *See* In the Matter of AT&T Communications Construction of Fiber Optic Signal Regeneration Facility near Burkittsville, Maryland, *Comments of Global Crossing Telecommunications, Inc.* (NSD-L-99-103)(Jan. 27, 2000) at 4-5 (an argument crafted for not applying Section 1.312(b) of the Commission's Rules.)

legal rigor, and not as an afterthought to rule application.

If Congress acts in a particular field of activity, we know it may fully or partially occupy that field. Legislative preemption is typically well-defined and thoroughly understood by the FCC. And one fact is clear when the Commission does have jurisdiction. There is a difference between the Congress revoking jurisdiction *and* the Congress mandating forbearance of jurisdiction already granted by Congress.. When the Commission forbears from action under a particular rule, and says so in the text of that rule, it is typically doing so to answer a particular charge from Congress. When the Commission expressly notes that a former feature of that regulation—such as the requirement to meet the needs of NEPA and NHPA— then the Commission is merely noting the obvious. Congress did not preclude the exercise of all regulatory functions under that rule.

An example of this point arose in the Qwest/Narragansett Nation proceeding. RCN Telecommunications Services, Inc. confused an affirmative, positive Congressional act — a "major Federal action" — with inaction. RCN cited the Telecommunications Act of 1996 and stated, "Section 402(b)2(A) of the 1996 Act provides that the Commission 'shall permit any common carrier to be exempt from the requirements of section 214 . . . for the extension of any line . . ." In the Matter of Qwest Communications Line Construction in Richmond, Rhode Island, Compliance with Authorization Requirements Under Section 214 and the Environmental and Historic Preservation Requirements Under NEPA and NHPA, *Comments of RCN Telecom Services, Inc.* (NSD-L-00-05)(Feb 11, 2000) at 5.

But RCN is wrong to link the mere existence of a an act of regulation to the triggering of

NEPA. Having the power to regulate *and not regulating*, constitutes just as significant an impact on the environment as other methods. In fact, it is not clear that (de)regulation is nothing more than (re)regulation. As such, Section 47 C.F.R. § 63.01 of the Commission's rules implicitly defines a broad definition of "major Federal action" even in the absence of the more ministerial action which Congress has mandated the Commission forbear from performing. So another question to ask in the *Notice of Proposed Rulemaking* to answer the PEER Petition is whether the "constructive" "major Federal action" implied by Section 47 C.F.R. § 63.01 of the Commission's rules is, in fact, an accurate representation of Congressional intent? Returning to RCN's comments, when one states, "[t]his exemption is neither the result of the Commission's forbearance from regulation nor the product of a blanket exemption; rather, it is a statutory mandate", the environmentalist must reply, "So what?" A statutory mandate, a regulation in response to that mandate, and a blanket exemption as a reaction to the regulation *may all be "major Federal actions".*[36]

So the question concerning the definition of "major Federal action" for the purposes of FCC decision-making devolves to one of utility. "[A] non-federal project is considered 'federal action' if it cannot begin or continue without prior approval by a federal agency and the agency possesses authority 'to exercise discretion over the outcome.'"[37] In the case of fiber optic cable laying over near shore coral reefs, specific cables can not be landed without FCC approval. Submarine cable laying is therefore "a major Federal action".

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[36] *Id.* at 5.

[37] Mayaquezanos por la Salud Y el Ambiente v. United States, 1999 U.S. App. LEXIS 33416, *10-11, 13 (1st Cir. 1999) *citing* Sugarloaf Citizens Ass'n v. FERC, 959 F.2d 508, 512 (4th Cir. 1992).

III. Changes in the Telecommunications Industry Now Require Changes in the Commission's Environmental Rules.

The Need for Rulemaking. The telecommunications industry and the environmental movement agree that rulemaking is necessary to bring the Commission's environmental rules into the post-Telecommunications Act of 1996 era.[38] Where industry and environmentalists differ is on the nature of the changes brought by the Telecommunications Act of 1996. Industry sees "deregulation" through (tele)communications regulation and law, and assumes it is now also exempt from *environmental* laws. Environmentalists see a Federal Communications vacating its traditional role as a guardian of the public interest, and now insist on the enforcement of environmental laws.

As such, the Commission now has precedent and commentary in the FCC Record which is ill-suited toward the breadth of the Commission's "major Federal actions" post-Telecommunications Act of 1996. During the early stages of wireless communications tower buildout, at a time when new telecommunications line construction was relatively modest compared to the present buildout effort, it was legally correct to say that projects of the "telecommunications industry do not general raise environmental concerns . . . Thus we have categorically excluded most Commisison actions from environmental processing requirements."[39]

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[38] *Compare* In the Matter of AT&T Communications Proposed Construction of Fiber Optic Signal Regeneration Facility near Burkittsville, Maryland, *Joint Comments of RCN Telecom Services, Inc. and KMC Telecom, Inc.* (NSD-L-99-103)(Jan. 28, 2000) at 4-5.

[39] 51 Fed. Reg. 14999, 14999 (Apr. 22, 1986).

It has become a bald assertion that "it is appropriate for the Commission to categorically exclude [technical systems] in areas of prior or permitted use, because such projects will not individually or cumulatively have a significant impact on the human environment.[40] But the only reason either industry or Commission staff can make this statement is because of the role of the Army Corps of Engineers in this process. The Commission's categorical exclusions effectively rest on the integrity of Nationwide Permit No. 12 ("Public Utilities"), which is reviewed once every five (5) years. Has the Commission ever reviewed the Corps environmental assessment process to see if it substantiates a categorical exception in the case of line installation in areas of prior or permitted use?[41] How is the Army Corps of Engineers environmental review of NWP 12 useful in justifying a categorical exception for Submarine Cable Landing Licenses? What evidence is required, and under what standard is it judged, when one is exempting a particular technology use from the rules regarding "major Federal actions". And, finally, how does the environmental assessment performed ensure that no "major Federal action" will occur on the site?

This "technology doesn't harm the environment" mantra is just that: *a chant*. No Commission staff member and no industry commentor has asked the critical question. Is this "ante"deregulation chant an accurate statement fourteen (14) years later? Given the changes that have swept the Nation since those Cold War years, is the Commission so sure that the rulemaking to implement the Telecommunications Act of 1996 is not harming the environment and placing the

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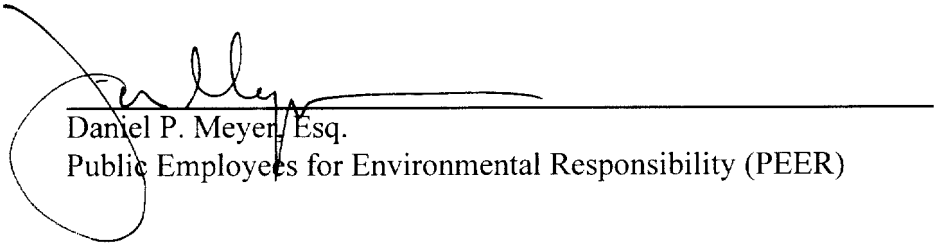
[40] *See* In the Matter of Qwest Communications Line Construction in Richmond, Rhode Island, Compliance with the Authorization Requirements Under Section 214 and the Environmental and Historic Preservation Requirements Under NEPA and NHPA, *Comments of RCN Telecom Services, Inc.* (NSD-L-00-05) (Feb. 11, 2000) at ii.

[41] *See* 47 C.F.R. § 1.1306 n.1 (1999).

Commission in violation of the law?

The Questions to Ask Before Redrafting the Environmental Rules. PEER respectfully requests the granting of its Petition, and the subsequent issuing of a Notice of Proposed Rulemaking which will redraft the Commission's environmental rules to reflect changes in the regulated economy since the passage of the Telecommunications Act of 1996. As the record now shows that fidelity to NEPA is not the federal norm, the FCC must issue a Notice of Proposed Rulemaking (NPRM) asking the questions listed in the text of these Comments, and listed in the "Summary", supra at page ("i"). By answering these initial queries, and other questions proposed by the fixed-wire and wireless industries and all parties during subsequent stages of this Public Notice's review, the Commission will be able to bring itself into compliance with the National Environmental Policy Act of 1969.

Conclusion. Accordingly, Public Employees for Environmental Responsibility requests that the Commission answer its Petition for Rulemaking by issuing a Notice of Proposed Rulemaking for the issues raised in Docket Number RM-9913. Such a NPRM should be publicly notice through the most widespread means available, including the *Federal Register*, the *Daily Digest* and the website of the Consumer Information Bureau.



Daniel P. Meyer, Esq.
Public Employees for Environmental Responsibility (PEER)

August 14, 2000

Exhibit A

June 27, 2000

Colonel Joe R. Miller, District Engineer
Jacksonville District, Army Corps of Engineers
400 West Bay St., Jacksonville, FL 32202

RE: 70 Ph.D. Scientists Urge Higher Environmental Standards in Beach Dredge and Fill Projects

Dear Colonel Miller,

The existing paradigm for managing beach systems of the southeast United States using frequent and massive dredge and fill projects ("renourishments") may have significant cumulative effects upon coastal habitat quality and fisheries production. Despite mounting evidence of both direct and indirect environmental effects on fishes, invertebrates, and turtles in several marine communities across the shelf, over 100 acres of nearshore reefs are now proposed for burial by four beach dredging projects in east Florida. Given the available scientific information and the increased agency oversight of habitat quality mandated by the Essential Fish Habitat component of the Sustainable Fisheries Act, and the Presidential Coral Reef Initiative, we offer the following comments.

The biological impacts of large and frequent dredge and fill operations across the east Florida shelf are of particular concern due to the region's very high biodiversity. Several studies have documented over 325 invertebrate and algal species in association with nearshore reefs on the east coast of mainland Florida. These nearshore reefs also support high densities of juvenile fishes in areas otherwise devoid of any substantial three-dimensional structural habitats. Collectively, over 500 species have now been documented from these reefs. These habitats are important recruitment and nursery areas for a diverse marine fauna and flora, that includes rare taxa and important fishery species. For example, in the U.S., the striped croaker (*Bairdiella sanctaeluciae*) is limited only to nearshore reef formations of east Florida. Important new data also suggest nearshore reefs provide important feeding and shelter areas for endangered green sea turtles.

Several numbers suggest the scale of potential impacts:

- At least 50 large-scale offshore dredge and nearshore fill projects have occurred in southeast Florida since 1960, dumping over 50,000,000 cubic yards of offshore sediments into nearshore systems.
- Over 90 additional large-scale dredge projects are conservatively planned to occur between 2000 and 2046. At least 80,000,000 additional cubic yards of offshore sediments could be dumped within the same corridor of subtropical southeast Florida during this period.
- Dozens of large dredge craters have been dug among mid-shelf reef habitats of southeast Florida since 1960 with dozens more planned. The dumping of millions of cubic yards of fill directly into 3-5 m depths to build nearshore berms, a new activity in southeast Florida, is now in planning for over 10 sites.
- At least 100 acres of nearshore reefs and 35 acres of seagrass beds have been directly buried since 1970 (historical data on reef impacts is very limited). Hundreds of acres of shallow reefs will be buried in the next 50 years at the current rates.

Despite the number of projects, few field studies of short-term dredge-and-fill effects have been published in the peer-review literature. In addition, no studies of long-term effects are available. For example, no long-term water quality data have been examined to assess the potential for increased turbidity at either inshore fill sites or offshore dredge pits resulting from wind- or wave-induced resuspension of sediments. It is logical to hypothesize that chronically elevated turbidity may impact both primary and secondary production in substantial manners that will, however, be difficult to separate from confounding impacts such as overfishing.

The potential cumulative effects of repeated dredge excavations and habitat burials have never been detailed in environmental impact statements. In both past and recent EISs, a total of one paragraph is typically devoted to cumulative impacts. This is puzzling, given the above numbers and the many scenarios in which cumulative effects can develop. The impact statements for these open-shelf dredge projects have chronically assumed that areas effected are low-value habitats or that impacts are only short term. In time, such assumptions have evolved into administrative dogma that are not substantiated by the independent literature. This has occurred despite well-documented examples of negative cumulative effects in nearby systems (e.g., unanticipated cascade disturbance events impacting Florida Bay). In addition, all habitats impacted by these projects are now identified as Essential Fish Habitat - Habitat Areas of Particular Concern by the South Atlantic Fishery Management Council and should receive additional agency oversight.

Based on the available information, the administrative paradigm that repetitive, large-scale dredging and filling of coastal habitats of has no long-term environmental impacts is potentially false and, at best, premature. The above factors suggest that the "risk-averse" and "ecosystem-based" management approaches adopted by some federal and state agencies be functionally employed by the United States Army Corps of Engineers in its assessments of environmental effects, particularly cumulative impacts.

These points reflect the professional judgement of the undersigned researchers. They are not intended to represent the positions of their institutions. Thank you for your consideration of these comments.

Sincerely,

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Environmental Defense

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Dynamac Corporation

Dr. Lew Ehrhart
University of Central Florida

Dr. David Lindquist
Univ. North Carolina at Wilmington

Dr. Steve Ross
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Dr. Chris Koenig
Florida State University

Dr. John Ogden
Florida Institute of Oceanography

Dr. Mark Hixon
Oregon State University

Dr. Jon Shenker
Florida Institute of Technology

Dr. Kent Carpenter
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Dr. Philip Kramer
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Dr. Richard Strathmann
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Dr. Sam Snedaker
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Dr. William Neal
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Fishery Biologist

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Dr. Jim Rice
North Carolina State University

Dr. Robert Wilder
Pacific Whale Foundation

Dr. C. Richard Robins
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Dr. Bob Howarth
Cornell University

Dr. John Miller
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Dr. John Munro
Internat. Center Living Aquat. Mar Resources

cc: U. S. Fish and Wildlife Service, South Florida Field Office, Vero Bch.
U. S. Fish and Wildlife Service, Area 3 Office, Atlanta
National Marine Fisheries Service, Habitat Conservation Division, St. Petersburg, FL
National Marine Fisheries Service, Habitat Conservation Division, Washington, DC
Florida Dept. of Environmental Protection, Bureau of Beaches and Coastal Systems
Florida Fish and Wildlife Conservation Commission, Division of Marine Fisheries
South Atlantic Fishery Management Council
Environmental Protection Agency, Marathon Office
Army Corps of Engineers, Wilmington District
Florida Dept. of Community Affairs, Coastal Management Program

Related Literature

Army Corps of Engineers. 1996. Coast of Florida erosion and storm effects study: Region III with final environmental impact statement. USACOE Tech. Rept., Jacksonville District. Three volumes and appendices.

Butler IV, M. J., J. H. Hunt, W. F. Herrnkind, M. J. Childress, R. Bertelsen, W. Sharp, T. Matthews, J. M. Field, and H. G. Marshall. 1995. Cascading disturbances in Florida Bay, U.S.A.: cyanobacteria blooms, sponge mortality, and implications for juvenile spiny lobsters Panulirus argus. Mar. Ecol. Prog. Ser. 129:119-125.

Dodge, R. E., R. C. Aller and J. Thomson. 1974. Coral growth related to resuspension of bottom sediments. Nature 247: 574-576.

Gilmore, R. G., Jr. 1977. Fishes of the Indian River Lagoon and adjacent waters, Florida. Bull. Fl. St. Mus. Bio. Sci. 22(3), 147 p.

Gilmore, R. G., Jr. 1992. Striped croaker, Bairdiella sanctaeluciae. pp. 218-222. In C. R. Gilbert, ed. Rare and endangered biota of Florida. II. Fishes. Univ. Press of Florida, Gainesville, FL, 242 p.

Gilmore, R. G., Jr. 1995. Environmental and biogeographic factors influencing ichthyofaunal diversity: Indian River Lagoon. Bull. Mar. Sci. 57(1):153-170.

Kirtley, D. W. and W. F. Tanner. 1968. Sabellariid worms: builders of a major reef type. J. Sed. Petrol. 38(1):73-78.

Lindeman, K. C. 1997. Comparative management of beach systems of Florida and the Antilles: applications using ecological assessment and decision support procedures. pp.134-164. In: G. Cambers, ed. Managing beach resources in the smaller Caribbean islands. UNESCO Coastal Region & Small Island Papers # 1, 269 p.

Lindeman, K.C. and D.B. Snyder. 1999. Nearshore hardbottom fishes of southeast Florida and effects of habitat burial caused by dredging. Fish. Bull. 97(3):508-525.

Nelson, W. G. 1989. Beach nourishment and hard bottom habitats: the case for caution. pp. 109-116. In: S. Tait, ed. Proc. 1989 National Conf. Beach Preserv. Technol. Fl. Shore and Beach Preserv. Assoc., Tallahassee, FL, 236 p.

Nelson, W. G. and L. Demetriades. 1992. Peracariids associated with sabellariid worm rock (*Phragmatopoma lapidosa* Kinberg) at Sebastian Inlet, Florida, U.S.A. J. Crust. Bio. 12(4):647-654.

Odum, W. E. 1982. Environmental degradation and the tyranny of small decisions. BioScience 32(9):728-29.

Pandolfi, J., D. R. Robertson, and D. R. Kirtley. 1998. Sabellariid worms: builders of a major reef type. Coral Reefs 17:120.

Sedberry, G. R. and R. F. Van Dolah. 1984. Demersal fish assemblages associated with hard-bottom habitat in the South Atlantic Bight of the U. S. A. Environ. Biol. Fishes 11(4):241-258.

Telesnicki, G.J. and W.M. Goldberg. 1995. Effects of turbidity on the photosynthesis and respiration of two South Florida reef coral species. Bull. Mar. Sci. 57(2):527-539.

Wilber, P. and M. Stern. 1992. A re-examination of infaunal studies that accompany beach nourishment projects. Proc. 1992 Natl. Conf. Beach Preserv. Tech. pp: 242-256.

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ENVIRONMENTAL DEFENSE

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NEWS RELEASE

70 Ph.D. SCIENTISTS QUESTION THE DREDGING BURIAL OF SHALLOW REEFS

Higher Environmental Standards Urged In Beach Dredge & Fill Projects

(28 June, 2000 – Miami) Environmental Defense today delivered a letter signed by 70 Ph.D. research scientists to the Army Corps of Engineers, calling on the Corps and other permitting agencies to better evaluate the effects of dredging projects that will bury over 100 acres of nearshore reefs in east Florida with over 5 million cubic yards of sediments. Several such Army Corps projects are currently in the permitting or design process between southeast Florida and North Carolina.

The letter, signed by many leading fish, reef, and sea turtle researchers, questions the brief cumulative impact sections in the environmental impact statements often produced for these projects. "Over 500 species of fishes, invertebrates, and algae can use the reefs that will be buried by these dredge projects," said Dr. Ken Lindeman, an Environmental Defense senior scientist. "These reefs are protected as essential fish habitats and serve as nursery areas for important fishery species such as snappers and endangered species such as green sea turtles."

"The letter emphasizes the absence of any long term biological research on the impacts of these projects, either at the dredge sites on the open shelf or the shallow areas where the fill is placed," notes Dr. Grant Gilmore, a senior aquatic scientist at Dynamac Corporation. "A variety of negative effects can develop, some involving rare species that are poorly known and restricted to very few habitats," added Gilmore.

The letter emphasizes that in many impact assessments, only one paragraph has been devoted to cumulative impacts. In addition, the impact statements for open-shelf dredge projects assume that habitats affected are of low-value or that impacts are only short term. "Over time, such assumptions have evolved into administrative dogma that is not yet substantiated by the independent scientific literature," said Lindeman. "The Army Corps is overdue in adopting the risk-averse and ecosystem-based management approaches used by many other agencies when assessing environmental impacts. Ironically, a classic example of negative cumulative effects can be found adjacent to the reefs being buried in east Florida – the Florida Everglades, site of an $8 billion effort to restore environmental functions damaged by prior Corps activities," said Lindeman.

The letter reflects the opinions of scientists based on the best available technical information and does not imply institutional endorsements from scientists not employed by Environmental Defense. The letter and a list of its signatories is at www.environmentaldefense.org/programs/oceans/reef/.

Environmental Defense, a leading national nonprofit organization based in New York, represents more than 300,000 members. Since 1967 we have linked science, economics, and law to create innovative, equitable, and cost-effective solutions to the most urgent environmental problems.

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